

APPEAL NO. 172907
FILED FEBRUARY 13, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on July 18, 2017, and September 21, 2017, with the record closing on October 30, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on March 21, 2017, with a 16% impairment rating (IR) as certified by the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, (Dr. K) and mathematically corrected by the ALJ; and that, by agreement of the parties, the first certification of MMI and assigned IR from (Dr. P) on November 6, 2016, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant (carrier) appealed the ALJ's determinations regarding MMI and IR as being contrary to the great weight of the evidence and further argued that the ALJ abused her discretion in refusing to add the issue of extent of the compensable injury as requested by the carrier at the September 21, 2017, CCH.

The claimant responded, urging affirmance.

The ALJ's determination that the first certification of MMI and assigned IR from Dr. P on November 6, 2016, did not become final under Section 408.123 and Rule 130.12 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable injury on (date of injury), when his right hand was caught in a stamp press. The parties stipulated, in part, that the compensable injury includes a crush injury to the right hand and partial amputation of the pinky, middle and ring fingers of the right hand, and that the statutory date of MMI is March 21, 2017.

ABUSE OF DISCRETION

Following the first CCH on July 18, 2017, the ALJ issued a Presiding Officer's Directive (POD) informing Dr. K that the compensable injury includes a crush injury to the right hand and partial amputation of the right pinky, middle and ring fingers and requesting that the doctor re-examine the claimant and determine MMI and IR following

an additional surgical procedure which the claimant underwent on March 7, 2017. In response to the POD, Dr. K re-examined the claimant on August 11, 2017, and certified in a Report of Medical Evaluation (DWC-69) dated August 22, 2017, that the claimant reached MMI on March 21, 2017, with an IR of 17%, derived by rating the amputations of the right pinky, middle and ring fingers together with range of motion (ROM) deficits of all five digits of the right hand. In his narrative report submitted with the DWC-69, Dr. K stated that “[s]ince the entire hand is compensable and suffered trauma, all fingers will be included in the [IR] calculation.”

At the second CCH on September 21, 2017, the carrier requested addition of an issue concerning whether or not the compensable injury extends to the thumb and index finger of the right hand, arguing that a “crush injury” to the right hand is a “term of art” and that when it stipulated that the compensable injury includes a crush injury to the right hand, the carrier was not agreeing that such injury included the thumb and index finger. The ALJ denied the carrier’s motion to add an extent-of-injury issue.

Rule 142.7(a) provides, in part, that a dispute not expressly included in the statement of disputes will not be considered by the ALJ. In accordance with Rule 142.7(b), the statement of disputes for a hearing held after a benefit review conference (BRC) includes the benefit review officer's report, identifying the disputes remaining unresolved at the close of the BRC; the parties' responses, if any; additional disputes by unanimous consent, as provided by Rule 142.7(c); and additional disputes presented by a party, as provided by Rule 142.7(d) and (e), if the ALJ determines that the party has good cause. Under Rule 142.7(c), a party may submit a response to the disputes identified as unresolved in the BRC report, and that response shall be in writing; describe and explain the party's position on the unresolved dispute or disputes; be sent to the Division no later than 20 days after receiving the BRC report; and be delivered to all other parties, as provided by Rule 142.4 of this title (relating to Delivery of Copies to All Parties). Rule 142.7(e) provides, in part, that a party may request the ALJ to include in the statement of disputes one or more disputes not identified as unresolved in the BRC report, and the ALJ will allow such amendment only on a determination of good cause. Also in accordance with Rule 142.7(e), that request must be filed no later than 15 days prior to the hearing. The BRC in this case was conducted on May 23, 2017, and there is no evidence that the carrier filed a response to the BRC report. The carrier’s request to add an extent-of-injury issue under Rule 142.7(e) was urged at the September 21, 2017, CCH following receipt of Dr. K’s August 22, 2017, DWC-69 and narrative report. The ALJ stated that the designated doctor properly exercised his discretion in the method he used to rate the crush injury to the right hand. The ALJ noted further in the Discussion section of her decision that the parties agreed that the compensable injury included a crush injury to the right hand and amputation of several fingers and that Dr. K explained that he rated the entire hand and, in so doing, rated the

compensable injury. Under the facts presented and in light of the parties' stipulation, we perceive no error in the ALJ's denial of the carrier's motion to add the requested extent-of-injury issue and we hold that she did not abuse her discretion in taking such action.

MMI/IR

In her Decision and Order, the ALJ found that Dr. K's certification of MMI on March 21, 2017, and assignment of 17% IR was contrary to the preponderance of the evidence because in calculating the IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), the doctor made a mathematical error in calculating the IR at 17%. The ALJ, therefore, adopted Dr. K's certification of MMI on March 21, 2017, and assignment of IR as mathematically corrected by the ALJ to 16%.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). The ALJ's determination that the claimant reached MMI on March 21, 2017, is supported by sufficient evidence and is affirmed.

We disagree, however, that the claimant's IR is 16% as mathematically corrected by the ALJ. We note from a review of the Discussion section of her Decision and Order that the ALJ's calculation of IR pursuant to Chapter 3.1 of the AMA Guides resulting in a 16% IR is identical to Dr. K's calculation of IR resulting in a 17% IR except for calculation of ROM deficit of the proximal interphalangeal (PIP) joint of the middle finger. Dr. K and the ALJ each note that extension measurements at the PIP joint yield a digit impairment of 7% and flexion measurements at the PIP joint yield a digit impairment of 12%; however, Dr. K *added* these impairment figures to obtain a total PIP joint impairment of 19% while the ALJ used the AMA Guides' Combined Values Chart to *combine* the impairment figures to obtain a total PIP joint impairment of 18%. This difference in calculation of PIP joint impairment of the middle finger accounts for the difference in whole person IR calculated by Dr. K and the ALJ. The AMA Guides offers instruction on how to rate abnormal motion of the PIP joint and states at page 3/33:

3. *Add* the flexion and extension impairment percents to obtain the estimated finger impairment due to loss of motion at the PIP joint.

Because the ALJ combined the flexion and extension impairment percents to obtain finger impairment due to ROM loss at the PIP joint of the middle finger rather than add such impairment percents as directed by the AMA Guides, she erred in mathematically correcting Dr. K's IR. We accordingly reverse the ALJ's determination that the claimant's IR is 16% and render a new decision that the claimant's IR is 17% as determined by Dr. K.

SUMMARY

We affirm the ALJ's determination that the claimant reached MMI on March 21, 2017.

We reverse the ALJ's determination that the claimant's IR is 16% and render a new decision that the claimant's IR is 17%.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge